This judgment addresses two matters, the first being whether privilege in a draft expert report referred to in a witness statement has been waived and secondly the need for the adjournment of a strike out application.

The Background

Whilst what follows is not likely to be controversial, any findings are based on what was put before the Court and are not intended to bind the final trial judge.

Mr and (possibly) Mrs Overall owned some land at Kiln Lane, Bourne End, Bucks for which they hoped to secure a planning permission. Probably in 2008, he or they retained the Claimant to provide assistance in connection with it appears further planning applications and possibly any planning appeals in relation to this site. Mr Dale is and was the Managing Director of the Claimant and from his witness statement in these proceedings he has held a Diploma in Landscape Architecture and been an Associate Member of the Landscape Institute for 27 years; from 1997 he has become a Chartered Landscape Architect. The business of the Claimant is as its name implies that of Landscape Architects.
4. There seem to have been two related planning applications which were ultimately to be pursued in relation to the site. Each involved a different access to the site, one off Kiln Lane and one via Grassy Lane. These applications apparently related to the provision of a single three bedroom dwelling. Both applications were turned down and Mr Overall decided to appeal against both decisions in 2010. By this stage, Mr Overall had a team, including the Claimant, experienced planning Counsel, a specialist planning solicitor (Mr Brearley) and a planning consultant.

5. Much of what is the subject matter of the Overalls’s complaints is the report which Mr Dale produced in connection with the planning appeals in 2010. It is asserted that he should have produced a full Landscape and Visual Impact Assessment ("LVIA") report. Although the report which Mr Dale apparently did produce was entitled Landscape and Visual Impact Assessment, albeit that it was attached apparently to his proof of evidence for the appeal, he now says that it was obvious that it was not a full LVIA report. The local authority produced a report from a Mr Etchells which was a full LVIA report which, in Mr Dale’s statement for the purposes of this application, he says was "a good document that had been prepared thoroughly and independently"; he formed the view that "any report prepared by a proper independent expert using the full GLVIA methodology would come to similar conclusions". He says that he believed that, if he had produced such a report, it would only have shown that both schemes "had an adverse impact on the local character in landscape". He therefore decided not to put in any such report. He says that he is sure that the other members of the team would have realised that his report was not a full LVIA.

6. It is said that, when the planning appeals were heard, and Mr Dale was cross-examined he had to make concessions about his report not being a full LVIA one. The appeals were dismissed.

The Proceedings

7. For reasons best known to itself, that Claimant issued against Mr Overall three County Court claims in the Swindon County Court in March 2011, the total sum claimed including VAT being £10,623.77. The Defence and Counterclaim, supported by a Statement of Truth from Mr Overall, initially pleaded that the contract was with Cookham Construction Ltd, albeit very recently it is now said that this was not correct and that the contract was with Mr and Mrs Overall. The pleading set out some of the background facts, partly as set out above, and asserted that the Claimant was required to undertake formal LVIA’s but failed to provide them. Paragraph 13 pleaded the case in breach of contract and by way of negligence for the failure to prepare or supply reports compliant with the GLVIA methodology, the provision of reports which were lacking in a number of material respects, failure to amend reports beforehand, failure to advise that his reports and evidence contained various deficiencies and generally failing to exercise reasonable care and skill in the undertaking of preparatory work in relation to his evidence and reports for the planning appeals. Part of the defence is a total failure of consideration whilst the breach of contract and negligence are also relied upon in the Counterclaim. The causation case is identified along the lines that, if the Claimant had produced LVIA reports or identified deficiencies in the initial drafts, the Defendants would have succeeded on the planning appeals or at least had a significantly better chance of succeeding. It is said that Defendants would have developed the site so that eventually permission for five or six properties valued at £2.5 million each would have been obtained, leaving the site value at a level of at
least £5 million. It was said that the site was now only worth £150,000 compared with the greater value that the "site would have attracted up to the Claimant’s breach or following the further development of the site". Although a diminution in value and value of lost chance were identified, the quantum was identified as "£TBA". The prayer to the Counterclaim identifies a claim for damages "limited to £150,000, subject to precise quantification in due course on receipt of further evidence".

8. A Reply and Defence to Counterclaim was lodged which took issue with much of the complaints and between August and October 2011 there were various Requests for Further Information and Notices to Admit. As ordered, the Claimant served consolidated Amended Particulars of Claim which identified that the oral retainer was "to provide ecological, arboricultural and Landscape consultancy services on an ad hoc basis in connection with the intended development of the site located adjacent to Kiln Lane ...” Cookham Construction Limited was joined in as a defendant.

9. The claims were then transferred to the TCC in London. On 13 October 2011, the Claimant issued an application asking for the complaints in the Defence and Counterclaim of breach of contract and negligence to be struck out on the grounds that they had no "reasonable grounds for being brought" it was said that the "counterclaim presents allegations of professional negligence unsupported by expert evidence and should be struck out pursuant to the guidance in Pantelli Associates v Corporate City Developments Number 2…”

10. This application was supported by a witness statement of Ms Martineau which sets out the basis for the application. Although it does quote from the judgement of Mr Justice Coulson in the Pantelli case, it is a 3½ page statement which amplifies the basis of the application. A witness statement from Mr Dale, which also accompanied the application, runs to 72 paragraphs, supported by nearly 300 pages of exhibit, and goes into the history in some detail; indeed the level of detail represents almost what one would expect in a witness statement at a contested trial.

11. Because the parties initially believed that a whole day was required for the hearing of this application, 9 December 2011 was selected as the hearing date. Notwithstanding this and the fact that the Defendants and their solicitors had had the application and the two supporting statements since mid-October 2011, it was not until a very late stage that the Defendants produced its evidence. After close of business on 2 December 2011, the Defendants produced the first witness statement of Mr Hitchen, their solicitor. Later they served an application dated 5 December 2011 supported by another witness statement of Mr Hitchen; this relates to an application to make extensive amendments to the Defence and Counterclaim. On the morning of 6 December 2011, the Defendants served a 17 page witness statement from Mr Overall dated 5 December 2011 and on the same day a 28 page witness statement from Mr Brearley running to 120 paragraphs and supported by an exhibit that runs to over 90 pages.

12. The first witness statement of Mr Hitchen addresses in some detail what is described as "staggering" evidence and a "bolt out of the blue", namely the evidence from Mr Dale in effect that he privately acknowledged that a full LVIA report would have supported the local authority’s position. He argued that expert evidence is not required because the case is primarily concerned with was a reasonably competent expert witness would have done. However, he goes on to say at Paragraph 23 and 24:
“23…the Defendants are in a position to call expert evidence from a landscape architect supporting their case in any event. I am in possession of a draft report from a chartered architect, Mr David Clarke, which is a privileged document and in which I am not authorised to waive privilege. Nor would I advise my clients that privilege should be waived so as to afford the Claimant the advantage of unilateral disclosure of an as yet incomplete and draft report even were I authorised to waive such privilege if I thought it a good idea to do so.

24. I can, however, confirm, without waiving privilege in any part of the document which I have seen, that I have considered written material from a competent chartered landscape architect prepared to act as an expert witness in this case if required to do so; that I have obtained counsel’s views in relation to such material; and that the view of both counsel and myself is that, if accepted by the Court, the effect of this material if adduced at trial in a Part 35 compliant report will be to underpin the following salient points…”

13. He then goes on to set out over 5½ pages 18 separate points which on any sensible analysis can only have been culled from the report of Mr Clarke. Many of the points involve an identification of what a competent Landscape Architect should have done. An example is sub-paragraph (h):

“A competent (experienced) LA would undertake an informal preliminary assessment of the site and formulate a view on the likelihood of success of the proposal. They should not then have a completely different opinion following a formal assessment of site as set out in a LVIA.”

There are clear expressions of opinion of what Mr Dale should also not have done. There are cross references to what Mr Clarke has said or done, for example:

“(o) …Mr Clarke has himself produced [LVIA]s for single dwelling developments…

(p) Contrary to the views now expressed by Dale in his statement, but consistently with the views he expressed at the time, the contention that the proposals would have an adverse impact on Grassy Lane were, indeed, "open to serious challenge". Mr Clarke has identified no less than 8 specific points in support of this contention.

(q) A landscape architect has no reason to suppose that anyone else, even the other members of the planning team, has the same knowledge, understanding and expertise of landscape matters that he has. It is his place to draw attention to all matters relevant to this aspect of a planning appeal and not rely on others to draw attention to deficiencies in what he has done. Indeed, Mr Clarke has expressed the view that it would be professionally embarrassing if a non-landscape expert work to raise a deficiency in a landscape professional’s report or conduct.”

14. Mr Overall’s statement reads very much like a proof of evidence to be given at the ultimate trial. He does refer at Paragraphs 30 to 33 to advice from Mr Clarke, identifying for instance that he estimates Mr Overall’s prospects of success if the appeal had been properly supported as being "in the order of 50 - 60%" and that Mr Clarke has confirmed that Mr Dale "was, indeed, negligent in his handling of my
case”. Mr Brearley's witness statement similarly looks remarkably like a proof of evidence and addresses in what may well be unnecessary detail at this stage the detailed history of the planning appeal.

15. Perhaps unsurprisingly, the Claimant and its legal team were unable to provide a response by way of evidence to this late service of evidence on the part of the Defendants. The Claimant applied for an adjournment of its strike out application but also applied for disclosure of Mr Clarke’s draft report on the basis, as its Counsel asserted, that any privilege had been waived. Both these applications were contested by the Defendant. I will address the various arguments in the Discussion part of the judgment below.

The Law

16. So far as the adjournment of the strike out application is concerned, that is primarily a matter of case management bearing in mind at all times the Overriding Objective and the need to act in a just way. One needs always to bear in mind that a respondent to an application should, all things being equal, submit its responsive evidence in sufficient time before the hearing to enable the applicant to serve any evidence in reply. The TCC Guide states at Paragraph 6.4.2:

“It is important to ensure that the evidence in opposition to the application is served in good time before the hearing so as to enable:

• the court to read and mark up the evidence;
• the applicant to put in any further evidence in reply that may be considered necessary.

Such evidence should be served at least 5 working days before the hearing.”

The TCC’s procedures and approach to procedural hearings and applications are flexible and these sorts of recommendations are not "writ in stone". That said, there needs to be a reasonable explanation as to why they are not complied with.

17. In relation to the application to disclose Mr Clarke’s report, CPR Part 31.14(1) lays down that a “party may inspect a document mentioned in … (b) a witness statement”. Of course, it is open to the other party to show a good reason why the document in question should not be disclosed. Those reasons could include privilege. The notes to the CPR provide some guidance:

“Mere reference to a privileged document in a statement of case may not of itself lead to an implied waiver of the privilege, but reference to the extent of reliance on the privileged document is likely to do so… [31.14.5]

As with the statements of case, mere reference to a privileged document in a witness statement may not of itself lead to the implied waiver of the privilege, but waiver will occur where a party is "deploying" the material in court. See Great Atlantic Insurance Co v Home Insurance Co [1981] 1 WLR 529… [31.14.6]

18. The Court of Appeal in the Great Atlantic Insurance case referred to in the latter note quoted with approval a dictum of Mr Justice Mustill (as he then was) in the case
of Nea Karteria Maritime Co Ltd v Atlantic & Great Lakes Steamship Corpn and others [1981] Comm LR 138:

“… I believe that the principle underlying the rule of practice exemplified by Bucknell v British Transport Commission is that where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood. In my view, the same principle can be seen at work in Doland v Blackburn, in a rather different context.”

He went on:

“I believe that in summary and in perhaps not very concise terms one can see the rule of positive law being stated in the interests of justice, but where a party chooses to deploy evidence which would otherwise be privileged the court and the opposition must, in relation to the issue in question, be given the opportunity to satisfy themselves that they had the whole of the material and not merely a fragment. Thus I must start by asking myself what are the issues in relation to which the material has been deployed…”

19. Another example of the application of this principle arose in Dunlop Slazenger International Ltd v Joe Bloggs Sports Ltd [2003] EWCA 901 which, although the judgments were ex tempore, nonetheless they provide a good practical application of these principles. The appeal involved written statements which referred to information provided and advice given by an IT expert. Lord Justice Waller referred (in Paragraph 11) to the first paragraph of Mr Justice Mustill’s judgment above with approval, and went on to quote also with approval a textbook, Matthews & Malek:

“‘The key word here is 'deploying'. A mere reference to a privileged document in an affidavit does not of itself amount to a waiver of privilege, and this is so even if the document referred to is being relied on for some purpose, for reliance in itself is said not to be the test. Instead, the test is whether the contents of the document are being relied on, rather than its effect. The problem is acute in cases where the maker of an affidavit or witness statement has to give details of the source of his information and belief, in order to comply with the rules of admissibility of such affidavit or witness statement. Provided that the maker does not quote the contents, or summarise them, but simply refers to the document's effect, there is apparently no waiver of privilege. This benevolent view has not been extended to the case where the maker refers to the document in order to comply with the party's need to give full and frank disclosure, eg on a without notice (ex parte) application.”

So it is that the authors correctly identify that the authorities provide for a distinction between a reference to the effect of the document and reliance on the content…”

20. He then goes on to identify that this was a deployment case:
“12. In my view, this is clearly a deployment case. This is a case in which, by the terms of those paragraphs, 13 and 14 in particular, of Miss Ahmed, Miss Ahmed was seeking to refer to the contents of the information that was being supplied by the expert to her in order to seek to persuade Gibbs J to make an order that the further evidence should be allowed to be put in. It is furthermore a deployment case in a different sense. There was an attempt to put in evidence for the purpose of the trial. The evidence for the trial was again evidence of the contents of the information that was being supplied by the expert to JBSL. So there was deployment, at least at the stage when this matter was before Gibbs J, in two senses, both for the purpose of persuading Gibbs J and for the purpose of this evidence being material for the judge to consider at the trial. Mr Croxford has sought to suggest that this evidence was not relevant to any issue at the trial.

13. I have to say that I have never followed that submission. Indeed, the very fact that it was thought appropriate to put this evidence in at one stage of the trial demonstrates its relevance. It was obviously material on which JBSL wished to rely in order to support the version of events that they wished to put before the court of Mr Ali and Mr Tariq. It must be remembered that Dunlop are going to say that this document had been dishonestly produced at some early stage after 17th June. For there not to be a discovery of the explanation as to how the document had been produced until May would need some explanation if Mr Ali and Mr Tariq's explanation was going to be accepted. It was therefore highly material to seek to explain how that had come about by reference, as Miss Ahmed was saying, to the fact that this information had only come to their knowledge through the expert in February 2003…

15. To answer the question whether waiver of part of a privileged communication waives the complete information, it is that dictum of Mustill J (as he then was) which applies. A party is not entitled to cherry pick, and a party to whom privileged information is provided is entitled to have the full contents of what has been supplied in order to see that cherry picking is not taking place. If this material (paragraphs 13 and 14 of Miss Ahmed's statement) had been evidence given at a trial, there really would be no answer to the point that the full information should be provided in order to make certain that cherry picking is not taking place.”

21. Lord Justice Thorpe said at Paragraph 18:

“In preparing her witness statements dated 21st and 28th May 2003, Miss Usmat Ahmed might have confined herself to a bare reference to a report from Delta Clinics as a result of which she took steps to prepare statements from additional witnesses and supplemental statements from existing witnesses. But, as paragraphs 13 and 14 of her first statement and paragraph 3 of her second statement demonstrate, she elected to state what may prove to be either the whole contents or the significant contents of the report. As Mr Croxford concedes, the contents of the report were privileged, and their revelation by Miss Ahmed amounts to a waiver of privilege.”

22. I draw from these authorities the following propositions:
(a) Unless there is a good reason otherwise, documents referred to in a witness statement submitted to be used in interlocutory or final court hearings must be disclosed by the party submitting the statement.

(b) One good reason is that the documents are privileged.

(c) Privilege will be waived where the otherwise privileged document is actually or effectively referred to in a witness statement and or part of its contents are deployed for use actually or potentially in the interlocutory proceedings or in the final trial, as the case may be.

(d) A party which deploys part of the privileged document in a witness statement will, at least as a matter of general principle, be required to disclose the whole of the document because it is not just to allow a party by way of cherry picking to rely only on that part.

(e) The test of whether a document or part of it is being deployed is whether the contents of the document are being relied upon rather than the effect or impact of the document.

(f) Once having referred to the document or part of it in a witness statement, generally at least the Court will presume that it is relevant, because the very fact that it is referred to in the statement demonstrates its relevance.

**Discussion**

23. I will address the disclosure issue first. I have no doubt and am satisfied that that privilege has been waived here in relation to the draft report of Mr Clarke for the following reasons:

(a) Although Mr Hitchen asserts strongly that this is not a case in which expert evidence is required at all, he and his client, at least on a "belt and braces" basis in case they are wrong or ultimately are prejudiced at the trial by not having an expert, have retained recently (as the Court was told) a specialist Landscape Architect expert, Mr Clarke.

(b) It is absolutely clear that the fact that Mr Clarke has been lately retained was deployed by Mr Hitchen and its clients to bolster their defence to the application to strike out parts of the Defence and Counterclaim on the basis that at least originally it had not been underpinned by supportive advice or evidence from an independent expert. As this application now stands adjourned, I obviously express no view about the outcome of that application; indeed, I have not yet begun to form any views about it.

(c) It is equally clear that significant parts, at least, of that draft report have been deployed by Mr Hitchen in his witness statement as quoted above. He says that he has considered the written material in the draft but incomplete report of Mr Clarke and then he goes on at length over 5½ pages to set out what on any analysis is a précis of the report or substantial parts of it. Necessarily, he descends into substantial detail over those pages.
(d) Although he says that the effect of this material will underpin the 18 points which he makes, he is clearly relying on the contents. Simply by saying that the effect is set out in the 18 points does not mean that he is not relying on the contents. Indeed the paragraphs which I have quoted above expressly refer to specific things that Mr Clarke has clearly advised. The reality is that the detail has been deployed to demonstrate amongst other things the strength of the support to the Defendants’ case on the application.

(e) There has been no suggestion that only part of the draft report should be disclosed, if privilege has been waived.

(f) The fact that Mr Hitchen sought expressly to maintain privilege is immaterial if, as here, the otherwise privileged document or all or part of its contents is in fact being deployed. Indeed, Counsel for the Defendant did not seek to argue that the express maintenance of privilege by Mr Hitchen made any difference.

24. As for the adjournment, I granted it on the basis that it was only fair that the Claimant and its legal team had sufficient time to respond if they so wish and fully to prepare. As a matter of generality, it is simply not acceptable in the TCC or, I believe elsewhere, for a responding party to serve substantial witness statements in relation to interlocutory proceedings only 2 to 3 days before the hearing of the application in question, particularly if the application has been issued, as here, almost 8 weeks before and the date fixed for the hearing for a substantial period of time (as here). There was no viable excuse for this delay. I infer that the Defendants and their legal team wanted to "get their ducks in a row" which involved bringing in an expert to support their position and, clearly, this was not achieved quickly enough. It has also been largely unnecessary for such extensive witness statements to be procured for the purpose of the interlocutory proceedings and if any part of the explanation relates to the need for this exercise it is not a good reason.

25. It was argued, albeit not strenuously by Counsel for the Defendants, that no adjournment was necessary because it simply did not matter what the evidential response to the Defendants’ late evidence was. That, with respect, is not the point and is not necessarily correct. The Claimant as a matter of their right to a fair trial should be entitled to a reasonable opportunity to address the seriously delayed evidential submission of the Defendants; if it forms the view that large parts of it are irrelevant, then so be it but it should have that opportunity. It also follows from the order which I make about the disclosure of the draft report of Mr Clarke that the Claimant should have a fair opportunity to consider that report so that they can respond if they consider it relevant to do so. It was agreed that the time for delivery up of the draft report for inspection should be within a week.

26. Obversely, I have made it clear to the Claimant that it should restrict to the minimum necessary any responsive statements because the strike out application, if it is to be maintained, revolves around a relatively confined area of issue; it will be largely and possibly entirely unnecessary for the Court to form any view at this stage as to whether the evidence of one witness (factual or expert) or the other is to be preferred over the other. The hearing of the strike out application is not a trial on the merits.

Decision
27. I indicated to the parties at the hearing what my decisions on these two points were and gave brief reasons. It follows from the above that the Defendant must disclose the draft report of Mr Clarke and the hearing of the Claimant’s strike out application is adjourned to 25 January 2012, as the first convenient date in the new term which accommodates both Counsel.